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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Rosendale, New York))

MM Docket No. 93-17
RM-8170

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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CONSOLIDATED REPLY

State University of New York ("SUNY"), by its attorney, and pursuant to Section 1.429(g) of the Commission's Rules, submits this consolidated reply to the Oppositions to Petition for Reconsideration filed in this proceeding by Sacred Heart University, Inc. ("SHU") and Aritaur Communications, Inc. ("Aritaur"). Neither party states any valid defense of the Staff's decision in this case.

As an initial matter, both SHU and Aritaur apparently claim "interested party" status in this proceeding by virtue of their having filed applications for the newly allotted Channel 273A at Rosendale and the fact that, if SUNY is successful on reconsideration, Channel 273A will not be available for their use. However, neither party can lay claim to equitable consideration here. Each of them had a chance, in the rulemaking proceeding, to express an interest in applying for a station at

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Rosendale, and their interest could at that time have been accommodated by the allotment of then-available Channel 255A without adversely affecting SUNY's proposal to upgrade Station WFNP on Channel 273A. Neither party expressed any interest in a Rosendale channel; therefore, their claim to be "injured" by the requested modification of SUNY's license is belated at best.

Both SHU and Aritaur attempt to distinguish Sioux Falls, South Dakota, 51 Fed. Reg. 4169 (1986), in which the Commission used Section 1.420(g) to modify the license of noncommercial station KCFS to a nonreserved channel, thus making clear that the Section 1.420(g) procedure lawfully applies to such a situation. SHU's and Aritaur's arguments are unconvincing. First, despite the recently reached perception of the Staff that Section 1.420(g) cannot be applied to upgrade a reserved band station to a nonreserved frequency, the Commission did exactly that in Sioux Falls, without waiving its rules or otherwise suggesting that the procedure would not ordinarily be applicable. If the Commission was merely correcting a prior error in deleting Channel 211 for the Sioux Falls petitioner's use, as argued by SHU and Aritaur, it would have reserved the Channel 261 allotment it granted in that case, so as to provide the petitioner there an equivalent reserved channel. The Commission did not do so. Sioux Falls stands squarely for the proposition that Section 1.420(g) can be applied to the circumstances in Rosendale. Any decision to the contrary by the Staff is reversible error.

SHU and Aritaur also argue that Sioux Falls can be distinguished by the fact that the community there would continue to receive noncommercial service, citing

Siloam Springs, Arkansas, 2 FCC Rcd 7485 (1987), aff'd 4 FCC Rcd 4920 (1989), and Bulls Gap, Tennessee, 10 FCC Rcd 10444 (1995). SHU and Aritaur ignore the fact that SUNY stated unequivocally that it intends to operate Station WFNP as a noncommercial educational station on the new Channel 273A, and that, as a result of the requested upgrade, Station WFNP would actually enhance its noncommercial service to Rosendale by being able to operate on a full-time basis. The State University of New York, one of the premier public educational institutions in the United States, is not in the business of turning over its stations to commercial operators.

If SUNY had had fair notice of the Staff's view that WFNP's upgrade required Channel 273A to be reserved for noncommercial educational use, SUNY would have so requested based on a showing of Channel 6 preclusion of noncommercial educational frequencies, such as that provided by SHU. Indeed, if it would assist the staff in resolving this case, SUNY would urge it on reconsideration to reserve the frequency and modify WFNP's license, based on the Channel 6 study submitted by SHU.

SHU argues that SUNY has not shown how its proposed upgrade of Station WFNP would serve the public interest. In fact, the public interest is obvious. Station WFNP would for the first time be able to operate on a full-time basis, as would noncommercial educational station WRHV, Poughkeepsie, New York. Thus, the area would benefit by receiving two noncommercial educational signals by existing broadcasters with established records of service. This would provide

exactly the type of public benefit envisioned by the Commission in the Report and Order in MM Docket No. 83-1148, FCC 84-358 (released July 26, 1984), which adopted Section 1.420(g) in order to "continue its policy of encouraging broadcast licensees to upgrade their facilities."

SHU goes on at length in a confusing discussion about various other facts of this case, although their relevance to the issues on reconsideration is not apparent. For example, SHU raises questions about SUNY's intentions during the rulemaking to utilize a transmitter site for Channel 273A that is fully spaced under the FCC rules. However, in its application to modify WFNP to specify operation on Channel 273A, SUNY did in fact specify a fully-spaced site that provides city-grade coverage to Rosendale. SHU also questions SUNY's city and class of license, which was modified in 1992 from New Paltz, New York to Rosendale, New York and from Class B1 to Class A. The Commission found these modifications to be in the public interest by granting SUNY's application to change city of license in File No. BPED-920429MF. That same decision reclassified the license from Class B1 to Class A merely to account for the FCC's decision to allow Class A stations to operate with up to the equivalent of 6 kw ERP/100 m HAAT. There are simply no issues here.

For the foregoing reasons, and for the reasons specified in SUNY's Petition for Reconsideration of November 21, 1995, the staff should grant reconsideration of its decision in this proceeding. It should modify SUNY's license for Station WFNP to specify operation on the newly allotted Channel 273A at Rosendale.

Respectfully submitted,

STATE UNIVERSITY OF NEW YORK

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Consolidated Reply" was served this 26th day of January, 1996, by first class United States mail, postage prepaid, upon the following:

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